BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JANET KARNOWSKI	)	
Claimant	)	
VS.	)	
	)	Docket No. 247,450
RICHARD T. DARNALL, D.D.S.	)	
Respondent	)	
AND	)	
	)	
CINCINNATI INSURANCE COMPANIES	)	
Insurance Carrier	)	

ORDER

Respondent appeals the preliminary hearing Order of Administrative Law Judge Brad E. Avery dated February 17, 2000. The Administrative Law Judge granted claimant temporary partial disability compensation and medical treatment with James R. Eyman, Ph.D., a licensed psychologist. The Administrative Law Judge found claimant's notice of intent requesting medical treatment adequate for preliminary hearing purposes.

ISSUES

(1) Was claimant's notice of intent under K.S.A. 1999 Supp. 44-534a sufficient to provide respondent with notice of the specific benefit changes being sought at preliminary hearing?

(2) Did the Administrative Law Judge exceed his jurisdiction in awarding temporary partial disability benefits in the absence of medical evidence restricting claimant's ability to engage in substantial gainful employment?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant, a dental assistant for respondent, was stuck in the palm of her left hand on February 8, 1999, by a needle that had just been used on an AIDS-diagnosed patient. Claimant received authorized medical treatment, including the AIDS "cocktail," and continued working for respondent until July 29, 1999, when she was terminated by respondent for unknown reasons.

For the next several months, claimant attempted to find work as a dental assistant in the Topeka area, but was unable to do so. Finally, on November 1, 1999, claimant began working at Dillard's department store, earning $315 per week, which is less than the $375 to $400 per week claimant had averaged with respondent.

During the period August 15, 1999, through November 1, 1999, claimant received unemployment benefits in the amount of $217 per week. When claimant began working at Dillard's, the unemployment benefits stopped.

Claimant filed an E-1 Application for Hearing in this matter on August 26, 1999. The E-1 showed a date of accident of February 8, 1999, indicating under specific accident or disease that claimant was stuck by a needle of an HIV patient with a high load. High load indicated that the HIV patient had full blown AIDS.

The injury discussed on the E-1 included the needle stick to claimant's left hand and also listed psychological injuries and the headaches and nausea claimant suffered from various medications she was receiving. Early on in claimant's treatment, respondent offered claimant psychological counseling, but claimant, at that time, did not believe she was in need of any counseling and declined.

Claimant's termination of employment on July 29, 1999, came as a complete surprise to claimant. On that day, claimant went to lunch and, upon returning from lunch, found a handwritten note from Richard T. Darnall, D.D.S., stating that he was "sorry things didn't work out as well as both of us had hoped." Claimant's final paycheck was attached. Dr. Darnall wished claimant well in the future. Claimant attempted to talk to Dr. Darnall about the termination, but was not allowed to visit with the doctor. Up to that point in her employment, claimant was unaware of any dissatisfaction with her job performance.

When claimant began seeking other employment as a dental assistant, she encountered substantial difficulties. Apparently, the rumor about her exposure to the AIDS virus had circulated through the dental community. This, coupled with the uncertainty in claimant's life as to whether she was infected with HIV or would develop full blown AIDS, caused problems in claimant's marriage and placed claimant under substantial psychological stress.

Claimant was referred by her attorney to James R. Eyman, Ph.D., a licensed psychologist, for an evaluation. Dr. Eyman, who examined claimant on August 31, 1999, and October 13, 1999, recommended that claimant be placed on antidepressant medication and undergo individual psychotherapy to help address her increasing depression. On January 7, 2000, claimant's attorney provided a seven-day notice letter, as required by K.S.A. 1999 Supp. 44-534a, to respondent. This notice letter stated that the hearing was for the purpose of obtaining:

"X [T]emporary total or temporary partial disability benefits;

"X [C]ontinuing provision of medical treatment or an authorized provider if non [sic] has been designated;

"X [T]he payment of all outstanding authorized medical and unauthorized medical up to $500;

"X [C]hange of physician; and/or

"X [R]eimbursement for mileage and prescription expenses."

All of the above designated benefits were marked with an "X". However, the report of Dr. Eyman was not attached to claimant's notice. Claimant then requested a preliminary hearing, which was scheduled for February 8, 2000. On February 4, 2000, claimant's attorney faxed Dr. Eyman's report to respondent's attorney in anticipation of the preliminary hearing. At preliminary hearing, respondent objected, alleging a lack of adequate notice as required by K.S.A. 1999 Supp. 44-534a. The Administrative Law Judge, in considering the report of Dr. Eyman, awarded claimant temporary partial disability benefits during the period claimant was receiving unemployment and at a reduced rate after claimant began working for Dillard's. Claimant was also granted medical treatment with Dr. Eyman until further order or until claimant was certified as having reached maximum medical improvement. Respondent contends the Administrative Law Judge erred in considering the report of Dr. Eyman, as it was not attached to the notice of hearing as required by K.S.A. 1999 Supp. 44-534a.

K.S.A. 1999 Supp. 44-534a states in part:

> At least seven days prior to filing an application for a preliminary hearing, the applicant shall give written notice to the adverse party of the intent to file such an application. Such notice of intent shall contain a specific statement of the benefit change being sought that is to be the subject of the requested preliminary hearing. If the parties do not agree to the change of benefits within the seven-day period, the party seeking a change in benefits may file an application for preliminary hearing which shall be accompanied by a copy of the notice of intent and the applicant's certification that the notice of intent was served on the adverse party or that party's attorney and that the request for a benefit change has either been denied or was not answered within seven days after service. Copies of medical reports or other evidence which the party intends to produce as exhibits supporting the change of benefits shall be included with the application.

Respondent alleges that the Administrative Law Judge exceeded his jurisdiction in awarding temporary partial disability in the absence of medical evidence restricting claimant's ability to engage in substantial gainful employment.

K.S.A. 1999 Supp. 44-534a and K.S.A. 1998 Supp. 44-551 restrict a party's right to appeal from a preliminary hearing to situations where it is alleged that the administrative law judge exceeded his or her jurisdiction in granting or denying the benefits allowed. Certain issues considered jurisdictional include whether an employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply. The Appeals Board, in Brown v. Lawrence-Douglas County Board of Health, WCAB Docket No. 205,848 (March 1996), held that temporary partial disability is to be treated the same as, and is considered a form of, temporary total disability compensation, as contained within the provisions of K.S.A. 44-510e. As temporary total and temporary partial disability are to be treated similarly at preliminary hearing, the Appeals Board finds an award of temporary partial disability compensation is a nonjurisdictional decision, not subject to appeal from a preliminary hearing, just as is temporary total disability compensation. Therefore, the respondent's appeal on this issue is dismissed.

Respondent also contends that the notice of intent, with the required copies of medical reports, was not properly supplied prior to the February 8, 2000, preliminary hearing. The report of Dr. Eyman was not provided until February 4, 2000, approximately four days prior to the February 8, 2000, preliminary hearing. However, the notice of intent and preliminary hearing application were filed well in advance of the preliminary hearing. Therefore, the dispute centers around claimant's failure to attach Dr. Eyman's report to the E-3 Application for Preliminary Hearing and the notice of intent when they were filed in January 2000.

In the case of Eldridge v. Champ Service Line Division, WCAB Docket No. 189,361 (Aug. 1997), the Board held that a decision by an administrative law judge whether to consider documents not attached to preliminary hearing requests is a decision within the jurisdiction of the administrative law judge. Those decisions, where medical records are not made available prior to the preliminary hearing, are within the discretion of the Administrative Law Judge and do not constitute issues appealable from preliminary hearings under K.S.A. 1998 Supp. 44-551 or K.S.A. 1999 Supp. 44-534a. The Appeals Board, therefore, finds it does not have jurisdiction to consider this particular issue. Respondent's appeal on this issue is, therefore, dismissed.

Finally, respondent alleges that the Administrative Law Judge exceeded his authority when appointing an authorized treating physician when there was no request contained in the notice of intent letter sent to respondent for a change of physician. However, the notice of intent letter provided by claimant specifically lists "medical treatment

or an authorized provider if non [sic] has been designated," and a "change of physician." Additionally, in the E-1 filed in August 1999, it was alleged that claimant suffered psychological injury from the needle stick. Respondent earlier offered psychological counseling to claimant but, at that time, claimant did not feel she was in need of it and rejected same. It cannot be argued by respondent that the involvement of or allegations of a psychological injury came as a surprise in this case. Here, the Appeals Board finds that claimant's request for a change of treating physician and the involvement of a psychological injury were well-known to respondent. In the case of Kane v. Westwood Animal Hospital, WCAB Docket No. 204,483 (May 1997), the Appeals Board considered the narrow issue of whether the assistant director exceeded his authority when appointing claimant to an authorized treating physician, when such request was not specifically contained in the notice of intent letter sent to respondent. In that instance, the Appeals Board found that claimant's notice of intent letter, served upon the adverse party, did not include a request for the appointment of an authorized treating physician and the assistant director's order appointing a doctor as the treating physician violated respondent's due process rights.

Here, however, respondent was well aware that claimant alleged psychological injury and had, early on, offered psychological counseling. In addition, the notice of intent letter provided by claimant requested not only the authorization of medical treatment, but also a change of physician as well. The Kansas Supreme Court has stated that an important objective of workers' compensation law is avoiding cumbersome procedures and technicalities of pleadings so that a correct decision may be reached by the shortest and quickest possible route. Pyeatt v. Roadway Express, Inc., 243 Kan. 200, 756 P.2d 438 (1988).

The Appeals Board cannot find, in this instance, that the Administrative Law Judge exceeded his jurisdiction in allowing Dr. Eyman to provide psychological counseling to claimant. The Appeals Board, therefore, finds that, under K.S.A. 1999 Supp. 44-534a, respondent's request that this order be reversed should be, and is hereby, denied.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Brad E. Avery dated February 17, 2000, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of April 2000.

BOARD MEMBER

c: Roger D. Fincher, Topeka, KS
Christopher J. McCurdy, Wichita, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director